John Lo Sie Yin, it appears has not sworn positively that he had personal knowledge of the payments made by the defendants to the plaintiffs, nor in regard to the agreements made between the parties.

Chong Siew Fai, advocate for the plaintiffs likewise cannot swear positively as to the facts since he is only acting on instructions of his client and his evidence is largely hearsay, as his affidavit shows.

It was decided in *Symon & Co.* v. *Palmer's Stores (1903), Limited*,[4] that where the affidavit is made by a person other than the plaintiff he must swear positively to all the matters necessary to constitute a *prima facie* cause of action.

Further down at page 263, it was held that:

"The remedy given by the Order is a most stringent one, namely, a judgment without a trial.....the framers of the Rules intended that the affidavit so required should be a condition precedent to the exercise of the power conferred by the Order to give judgment without a trial."

The judgment goes to say at page 264:

"...if there be not a compliance with the terms of Order XIV., r. 1, in respect of the affidavit to be made, there is no jurisdiction to give effect to that impression by making an order for judgment."

It is to be observed that omission to file an affidavit in reply is not fatal (see Federal Court decision in the case of *Shanghai Hall Ltd.* v. *Town House Hotel Ltd.*[5]).

The question for decision is whether on the facts and in the circumstances of this case the mode of procedure adopted by the plaintiffs sufficiently complied with the requirements of O.14 r.1.

It is the court's opinion it has fallen short of the requirements of that Order.

A number of cases have been cited by counsel on both sides.

Upon the view which I have taken on the above, it becomes unnecessary for me to express an opinion as to the matters.

I therefore dismiss the application.

Application dismissed.

Solicitors: *Skrine & Co.*

NATHAN v. PUBLIC PROSECUTOR

[A.Cr.J. (Ong Hock Sim F.J.) April 15, 1972]

[Penang — Criminal Appeal No. 25 of 1972]

Criminal Law and Procedure — Appeal — Accused desiring to expunge remarks from record — Locus standi — Inherent power of court to review — Criminal Procedure Code (S.S. Cap. 21) s. 322.

Criminal Law and Procedure — Grounds of decision — Not competent for court to supplement signed grounds of decision or make deletions therefrom — Unsatisfactory features of case — References of press reports in grounds of decision — Effect of.

Evidence — Testimony of accomplice — General principles.

Bribery and Corruption — Evidence of accomplice under Prevention of Corruption Act, 1961, s. 18.

The appellant/accused was charged under section 4(a) of the Prevention of Corruption Act, 1961, and was acquitted and discharged on January 10, 1972, without his defence being called at the close of the prosecution. The accused was dissatisfied with the order of the learned president because a remark was made to the effect that the acquittal was "on purely technical grounds", and with other observations made in the grounds of decision. He alleged, *inter alia*, a miscarriage of justice in that the learned president had delivered three sets of grounds of decision.

The purpose of this appeal was to expunge the offending remarks.

Held: (1) although the accused had no *"locus standi"* to "appeal" in connection with the judgment of the learned president, nevertheless, the court had inherent power, pursuant to section 322 of the Criminal Procedure Code, to review the decision;

(2) the only judgment for consideration by the court was the signed copy of the grounds of decision. It is not competent for the court to supplement the signed grounds of decision;

(3) there should be a retrial of the accused before another sessions court president.

Cases referred to:-

(1) *Sheo Swarup & Ors. v. King Emperor* 51 T.L.R. 10 at p. 11; L.R. 61 I.A. 398; A.I.R. 1934 P.C. 227.

(2) *Grondkowski & Anor.* (1946) 31 Cr. App. R. 116 at p. 120.

(3) *Loh Kwang Seang* v. *Public Prosecutor* [1960] M.L.J. 271.

(4) *Putra v. Sivagnanam & Anor.* [1959] M.L.J. 259 at p. 260.

(5) *Public Prosecutor* v. *Haji Ismail & Anor.* [1940] M.L.J. 76.

(6) *Soosay Dass* v. *Public Prosecutor* [1951] M.L.J. 57 at p. 58.

MAGISTRATE'S CRIMINAL APPEAL.

Edgar Joseph Jr. for the appellant.

Mohamed Yosuf bin Mohamed Nor (Deputy Public Prosecutor) for the Public Prosecutor.

Ong Hock Sim F.J.: The accused, Mr. T. N. Nathan, was charged in the sessions court, Georgetown on a charge under section 4(a) of the Prevention of Corruption Act (No. 42) of 1961) and, after a somewhat lengthy trial, was acquitted and discharged on 10th January 1972 without his defence being called at the close of the prosecution.

Despite his acquittal, the accused was dissatisfied with the judgment or order of the learned president because of his remark to the effect that the acquittal was "on purely technical grounds" and with other ob-

servations made in the grounds of decision. A cross-appeal was also filed by the learned deputy but as no petition was lodged within the time prescribed by section 302 was deemed to have been withdrawn pursuant to sub-section (8).

On the 8th of April the accused appeared in person to apply for a postponement of the hearing of the appeal to a date some 6 weeks later to enable him to engage a counsel in view of the lengthy record of 137 pages.

I drew the attention of the accused to section 302 Criminal Procedure Code (S.S. Cap. 21) which provides for an appeal by any person dissatisfied with any judgment, sentence or order pronounced in a criminal case and to section 300 which expressly enacts that in the event of an acquittal there shall be no appeal except by the Public Prosecutor. The accused said that he was not "appealing from the acquittal" but sought only by these proceedings headed "Petition for Appeal or Petition for Revision" to expunge the offending remarks from the record. I accordingly ruled that the accused had no "*locus standi*" to "appeal" in connection with the judgment of the learned president.

I intimated however to the accused that, having the record before me, it is open to me to exercise the inherent power of the court to review the decision of the learned president pursuant to section 322. I therefore adjourned hearing to 15th April 1972 to consider whether I should do so. I informed the accused that I would be prepared to entertain any arguments by him or counsel on his behalf before making any order. On that day Mr. Edgar Joseph Jr. appeared on behalf of the accused and urged that a retrial ought not to be ordered except in very exceptional circumstances. He said that it should not be ordered where the nature of the prosecution evidence was unsatisfactory, also that to order a retrial would be giving the prosecution a second chance to prove its case. Other considerations, he said, would be unfairness to the accused, staleness of the proceedings, expense to accused and unnecessary prolongation of the outcome of the trial.

Under sub-section (1) of this section the court may exercise all the powers as it may, on appeal. These powers include, *inter alia*, the power in an appeal from an order of acquittal to reverse such order and direct that further inquiry shall be made or that the accused shall be retried. [section 310 (a)]. It was contended on behalf of the appellants in the case of *Sheo Swarup & Ors.* v. *The King Emperor*[1] that —

"On an appeal from an order of acquittal on a matter of fact it is not open to the appellate court to interfere with the findings of fact of the trial judge, unless it can be said that those findings could not have been reached by him had it not been for some perversity or incompetence on his part. The High Court declined to accept this view. They held that no condition was imposed on the High Court in such an appeal.... There is, in their opinion, no foundation for the view, apparently supported by the judgments of some courts in India, that the High Court has no power or jurisdiction to reverse an order of acquittal on a matter of fact, except in cases in which the lower court has 'obstinately blundered,' or has 'through incompetence, stupidity, or perversity' reached such 'distorted conclusions as to produce a positive miscarriage of justice,' or has in some other way so conducted or misconducted itself as to produce a glaring miscarriage of justice, or has been tricked by the defence so as to produce a similar result."

The judgment by the Privy Council delivered by Lord Russell of Killowen went on to say:

"...In exercising the power conferred by the Code and before reaching its conclusions on fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused — a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognised in the administration of justice."

Bearing these principles in mind, I would remind myself of the words of Lord Goddard, L.C.J. in the case of *Grondkowski & Anor.*[2]:

"The judge must consider the interests of justice as well as the interests of the prisoners. It is too often nowadays thought, or seems to be thought, that 'the interests of justice' means only 'the interests of the prisoners'."

In this petition, the accused alleged, among other things, a miscarriage of justice in that the learned president had delivered three sets of grounds of decision for the purpose. I would only refer to section 302 sub-section (3) of the Criminal Procedure Code which reads:

"When a notice of appeal has been lodged the court appealed from shall make a signed copy of the grounds of decision in the case and cause the same to be served upon the appellant or his advocate."

In view of that, the only judgment for the consideration of the court is the second or the signed copy of the grounds of judgment, with the offending words which were not uttered in open court on 10th January, 1972, the so-called first set of grounds of decision. Regarding the subsequent purported deletions made in the "third set" of grounds of decision, it is, in my opinion, not competent for the court to supplement the signed grounds of decision (see *Loh Kwang Seang* v. *Public Prosecutor*[3] or, as a necessary corollary, to make deletions therefrom.

One further unsatisfactory feature of the case, which I am compelled to remark on, is press reports appearing — fairly fully in the *Straits Echo* of the 8th of January, and not so fully in the *Straits Times* of the same day. These reports had the appearance of a sort of "inquisition" between Bench and prosecuting counsel.

While I say I would not normally have taken any note of press reports — which do not form part of the record — in this particular instance, there are references in the grounds of judgment of the learned president appearing at pages 135, 136 and 138 of the record. I quote his words at page 138:

"The learned deputy made a statement from the Bar table.... In the circumstances, it would be wholly wrong for the court to accept the word of the learned deputy public prosecutor from the Bar table in preference to the testimony under oath of a key prosecution witness. I have no reason to disbelieve P.W.1 on that point."

This goes to show that the learned president appeared to have been a little confused as to the evidence which he ought properly to consider in arriving at his conclusion. I would also note another unsatisfactory

aspect of the case, which is the learned president's approach on the question of the credit to be given to Mr. Manikavasagam (PW1). He would reject the evidence of PW1 solely by reason of the failure of the Anti-Corruption Agency officers who interviewed Manikavasagam on the 17th-18th February, 1970, to record a "first statement". I may add here that he has thereby misdirected himself in regard to this failure of the Anti-Corruption Agency officers to record that which he termed a first information in writing, citing *Putra* v. *Sivagnanam & Anor.*[4] The officers, though members of the police force, were not, in my view, exercising functions or powers under Cap. XIII Part V, (Criminal Procedure Code), but were acting under directions of the Anti-Corruption Agency. Manikavasagam stated that no statement was recorded on either of those two days but a statement was taken in May or June of that year. The two Anti-Corruption Agency officers confirmed that no statements were recorded on the 17th or 18th February. PW1 gave an explanation for the material contradiction in his oral statement to the Anti-Corruption Agency officers on the 17th and 18th February, 1970 and his subsequent statement in June, 1970 after he had been advised by Mr. Shankar. I think the learned president also misdirected himself by making this observation:

"The learned defence counsel did not at any time make an application to the court to impeach the credit of P.W.1 by reference to his previous oral statement. Why! In view of the said material contradictions and in the absence of a satisfactory explanation from P.W.1, I hold that the credit of P.W.1 had been impliedly impeached. On that sole ground of pure technicality I acquit and discharge the accused."

I would say this: If defence counsel had seen fit, it would be for him to seek to impeach PW1. Why he did not do so is a question the learned president should have directed to defence counsel but not thereby assume it to be a ground for drawing an adverse inference against the prosecution. An explanation was given by the witness for this apparent contradiction. It was the duty of the learned president to attach such weight to it as he thought proper. In applying general principles regarding accomplice evidence, it is advisable to bear in mind what was said in *Public Prosecutor* v. *Haji Ismail & Anor.*[5]

"A magistrate should first decide whether a witness is an accomplice; then determine on the evidence whether he is corroborated in any material particular; and then, if he is not corroborated, subject the accomplice's evidence to a close scrutiny to satisfy himself that, without corroboration, there is nevertheless evidence which is credible and sufficient to establish the guilt of the accused."

It is to be remembered, however, that in view of what is sometimes referred to as a modification of the law of evidence in regard to accomplice evidence, there is provision in the Prevention of Corruption Act, section 18, which recites that —

"Notwithstanding any rule of law or written law to the contrary, no witness shall, in any such trial or inquiry as is referred to in section 17, be presumed to be unworthy of credit by reason only of any payment or delivery by him or on his behalf of any gratification to an agent or member of a public body."

As Mr. Justice Taylor said in *Soosay Dass* v. *Public Prosecutor*[6] where he referred to a somewhat similar section in the Prevention of Corruption Ordinance 1950:

"The section does not abrogate the established practice nor does it apply to accomplices generally; it simply defines a particular class of accomplice whose complicity is not serious enough necessarily to raise a presumption of discredit."

In view however of what I propose to do in this case, I shall not deal with, or go in detail into, the evidence before the court which may affect or influence the future trial.

The accused has been acquitted at the close of the prosecution without his defence being called, but I do not propose to remit the case to the learned president with a direction that he call upon the accused for his defence. I am mindful of the great expenditure of time and money this course would entail, as the record shows some 19 witnesses were called and the trial took over 3 weeks. In my view, the interests of justice can best be served if I order, as I now do, that there should be a retrial of the accused before another president.

Retrial ordered.

Solicitors: *Joseph & Son.*

TAN HEE LOCK v. THE COMMISSIONER FOR FEDERAL CAPITAL, KUALA LUMPUR & ORS.

[O.C.J. (Abdul Hamid J.) June 9, 1972]

[Kuala Lumpur — Originating Motion No. 30 of 1971]

Administrative law — Certiorari — Audi alteram partem principle — Whether applies in respect of an application to commissioner under Rent Control Act, 1966, s. 18A.

This was an application for an order of *certiorari* to remove to the High Court the order of the Commissioner for the Federal Capital, Kuala Lumpur, to be quashed.

On February 13, 1971, the commissioner made an order under section 18A of the Control of Rent Act, 1966, requiring the applicant, as tenant of premises No. 87 Jalan Tuanku Abdul Rahman, Kuala Lumpur, to deliver vacant possession of the said premises within 6 months from the date of the order, awarding the applicant compensation in the sum of $7,444.

Held, dismissing the application: the decision of the Federal Court in *Mohamed Ashraff & Anor.* v. *The Commissioner for Federal Capital, Kuala Lumpur*[1] applied to the circumstances of this case.

Preliminary point on joint application by owners of separate premises discussed.

Case referred to:-

(1) *Mohamed Ashraff & Anor.* v. *The Commissioner for Federal Capital, Kuala Lumpur & Anor., ante* p. 69.

MOTION.

A. K. J. D'Cruz (*M. A. Gomes* with him) for the applicant.

Chan Siew Yoon for the first respondent.

N. A. Marjoribanks for second and third respondents.

Abdul Hamid J.: This is an application by Tan Hee Lock (hereinafter referred to as "the applicant") for an order of *certiorari* to remove the order of the Commissioner of the Federal Capital, Kuala Lumpur into this court to be quashed.